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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 49

MORTON SALT COMPANY,
a Corporation of Illinois,
Petitioner,

vs.

THE G. S. SUPPIGER COMPANY,
a Corporation of Delaware,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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The following comments upon some matters advanced in Respondent's Brief may aid the Court.

The *main* business of the respondent, as stated on p. 2 of its brief, may be *canning;* but that is not the business involved in this case. That business is the manufacture

and sale of salt tablets to the canning industry. (See Brief for Petitioner, p. 4.) That business was acquired with all patents, in June, 1938, from respondent's predecessor, Scientific Tablet Co. G. S. Suppiger is President and C. M. Schofield is general assistant to the President of the respondent and had the same offices in the said Scientific Tablet Co., respondent's predecessor in the *salt tablet business.* (R. 11, 25.)

On page 2 of Respondent's brief it is alleged that the respondent by its president G. S. Suppiger conceived the idea of the use of a salt tablet in canning vegetables never used before in commercial canning; and that, "These facts stand proved in the Sixth Circuit suit * * *."

The said "Sixth Circuit suit" is the case of *Scientific Tablet Co.* (*respondent's predecessor in the salt tablet business*) v. *Ossege*, charging infringement of its process patent No. 1,887,073, referred to on page 4 of Petitioner's Brief. (R. 55; 102.)

The salt tablets used by defendant Ossege in his canning operations (tomatoes) were sold to him by Morton Salt Company, petitioner here, which openly and of record assumed the defense of its customer, and is bound thereby.

Said case was tried Feb. 23-24, 1939. On Feb. 26, 1940, the Court issued its opinion holding said process patent invalid. A final decree, dismissing the bill, was entered April 29, 1940. (*Scientific Tablet Co.* v. *Ossege*, 31 Fed. Sup. 361.) The case is pending on appeal to the Circuit Court of Appeals of the Sixth Circuit.

Respondent's brief (p. 3) denies that the District Court's findings of fact were *adopted from findings common* to those presented by both parties. We believe that

this Court will accept petitioner's statement on page 4 of its brief as in substance correct.

On page 4, respondent's brief quotes Judge Evans as saying that:

> "(2) Defendant makes a machine and uses it in the same way as plaintiff. It requires its purchaser or licensee to use salt tablets made by it."

This is not in accord with the record as pointed out in our main brief on page 5. Judge Evans' statement overlooks the fact that your petitioner's machines are not patented and that your petitioner has not the leverage of a patent on the machines to enforce the notice on the tag attached to the leased machines.

On page 5 of respondent's brief it is stated:—"the petitioner is a direct infringer that has *wilfully copied* the respondent's machine * * *." There is no evidence whatever to that effect; neither of the Courts below found such fact, nor is it material.

The respondent's brief then follows: "This case is not a case of a plaintiff seeking assistance from the law to *stop a competitor from competing with it in unpatented merchandise.*"

The admitted facts show that this statement is unsupportable.

The petitioner's business specifically involved in this case, the manufacture and sale of salt tablets is directly in competition with the salt tablet business, begun by petitioner's predecessor, the Scientific Tablet Company, and carried on later by the respondent after it acquired that business. Your petitioner would never have needed

to design and lease any machine for dispensing its own salt tablets for use in the canning industry had not free competition in the sale of the unpatented salt tablets been blocked by the respondent, with its lease license agreements, based on its several patents, including the patent in suit and its aforesaid process patent. And your petitioner has had to defend its customer against the last named patent as hereinabove set forth.

As will have been noted above, and on page 6 of his brief, respondent has used the words "direct infringer" and "direct infringement". The question as to any difference between a direct infringer and a contributory infringer has not heretofore been raised in this case. Upon this point we are content to quote the words of the Court of Appeals below in the Lecithin case:

> "The plaintiff argues that the defense of extra-legal monopolization, admittedly valid in contributory infringement cases, is not available in direct infringement cases. This argument would permit the plaintiff to monopolize the sale of lecithin by controlling the buyers in the trade, although the law forbids the same result by controlling the sellers in the trade. Yet, to sanction control over buyers is to permit the plaintiff to control his competing sellers. It might be said, therefore, that the plaintiff is urging this court to approve doing in one form what can not be done in another form." (*American Lecithin Co.* v. *Warfield Co.*, 105 Fed. (2d) 207, at 211.)

Any distinction between a "direct infringer" and a "contributory infringer" in the matter of a patentee attempting to extend his legal patent monopoly to a monopoly of unpatented, commercial articles not covered by his legal monopoly under his patent, is without meaning.

It is not seen what comfort respondent can find in its attempt to bring its practice under the Clayton Act,

as it does on pages 10 and 11 of its brief. In the case of *Motion Picture Patents Co.* v. *Universal Film Manufacturing Co.*, the Court of Appeals applied that statute to the case and dismissed the bill. This Court, however, in affirming the decision of the Court of Appeals below and after quoting the Clayton Act, said:

> "Our conclusion renders it unnecessary to make the application of this statute to the case at bar which the Circuit Court of Appeals made of it, but it must be accepted by us as a most persuasive expression of the public policy of our country with respect to the question before us." (37 S. Ct. 421.)

The quotations in respondent's brief on pages 11 and 12 from the Motion Picture case concerning the extent to which the use of a patented machine may be restricted to specific supplies, in no manner supports respondent's contention that such restrictions may be valid under the general law, even though invalid under the patent law.

The case of *Federal Trade Commission* v. *Sinclair Refining Co.* is discussed in plaintiff's main brief on page 13 and needs no further discussion here. No patent or patents were involved in that case.

Respondent's Plan.

The respondent's *unlawful use of the patent in suit* in an attempt to *suppress competition in the unpatented salt tablets*, was a part of a general scheme or plan including its three other salt tablet depositing machine patents and its process patent No. 1,887,073, to establish a limited monopoly in the sale of said *salt tablets*.

The object and intent appear not only from the leases but also from the form letters, Defendant's Exhibits Nos.

3, 4, 5 and 8, referred to on page 14 of petitioner's main brief. Said form letters were sent generally to the canning trade, including lessees of plaintiff's patented machines and users of its patented process, warning them repeatedly of plaintiff's *exclusive right to sell salt tablets* for use in plaintiff's patented depositing machines and in its patented process. And the effect of the form letters on the business of the defendant is shown not only in complaints received from defendant's customers, as shown in Defendant's Exhibit 9 (R. 46), but also in the letter of cancellation of an order for a *depositing machine* and for *salt tablets* by the Lake Erie Canning Company, Defendant's Exhibit 12 (R. 49, 50).

It is obvious that respondent in this case has used and is using its patent as a leverage to dominate a field beyond the legitimate coverage of its patent, salt tablets used in the canning industry.

CONCLUSION.

For the reasons stated in our main brief, supplemented by those herein, the decree of the Circuit Court of Appeals below should be reversed, and the decree of the United States District Court sustained.

Respectfully submitted,

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Dated: Chicago, Ill.,
November 14, 1941.